

Michigan Foreclosure Seminar

Jeffrey D. Weisserman
TROT & TROT, P.C.
Farmington Hills, MI

Public Acts 29-31

- Effective July 5, 2009 (Two year sunset)
- Applies to primary residence (tied to homestead exemption)
- Additional notice of right to workout discussions
 - Mail certified and 1st class mail.
 - This is new date of first legal.
 - Must publish different notice once within 7 days.
 - Includes address
 - Borrower has 14 days to respond and request meeting through housing counselor.
 - Housing counselor then has 10 days to notify lender/servicer/designee.

Public Acts 29-31

- If no request for meeting, you may foreclose by advertisement.
 - 25 days/30 days
- If Borrower responds and requests meeting, 90 day “stay”.
Contact through credit counselor.
- During that time, must meet to discuss loan modification/workout possibilities.
 - Meetings to be held in county where property is located or mutually agreeable place.
- Designee may request financial information necessary to determine.
- Borrower may request HUD approved housing counselor be present

Public Acts 29-31

- If deal made, document and execute.
 - Borrower must return executed loan modification offered in good faith under this program within 14 days. If not, you may foreclose by advertisement.
- If no deal made, issue becomes whether one “should have been made”.
- Test:
 - If Government loan or GSE loan, use loan modification of applicable entity.
 - If conventional loan...

Public Acts 29-31

- Test is modified version of HAMP
 - Target 38% of Borrower's Gross Monthly Income
 - Does not take into account other debt
 - Can you lower total housing debt to 38% by:
 - Lowering interest rate to floor of 3%;
 - Amortizing loan over 40 years;
 - Eliminating late fees; and/or
 - Forbearing principal (capped at 20%) until end of loan period.
 - Statute does not call for waterfall;
 - Use one or more elements

Public Acts 29-31

- If, using applicable test, borrower qualified for a loan modification and one was not offered, must foreclose judicially.
 - Longer, more expensive option..
- Does not limit loss mitigation options. Can make deal using other methods.

Preliminary Questions

- Has Mortgagor breached a covenant?
 - Typically payment. Can be other items, including taxes, insurance, waste, etc.
- Is foreclosure the best solution?
 - Lost money in foreclosures
 - Alternatives:
 - Forbearance Agreements
 - Deed in Lieu
 - Reinstatement

Preliminary Questions

- Get Title Commitment/Foreclosure Sale Guaranty
- Any sign that property is abandoned?
- Does mortgage contain special notice requirements
 - E.g., certified mail, notice to different address
 - Typically in second home situation

Foreclosure by Advertisement vs. Judicial Foreclosure

- MCLA §600.3201 *et. seq.*
- “Every mortgage of real estate, which contains a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement.”
- Faster, less expensive
- One of limited number of states with non-judicial remedy

Foreclosure by Advertisement

- Must have a power of sale clause. MCLA §600.3201; *Bradway v Miller*, 200 Mich 648 (1918).
- Mortgagor must have breached a covenant of the mortgage. MCLA §600.3204(1)
- No other action pending to recover the debt. MCLA §600.3204(2)

Foreclosure by Advertisement

- Must be owner of indebtedness, have interest in indebtedness, or be servicing agent at time of first publication.

Davenport v. HSBC Bank USA
2007 Mich. App. LEXIS 1078
(Mich. Ct. App. 2007)

- Defendant admitted that it did not own mortgage at time of first publication. Why?
- What the case stands for:
 - Mortgagee must meet standard of MCLA §600.3204(1)(d)
 - Must be owner of indebtedness, have interest in indebtedness, or be servicing agent at time of first publication.
 - Obligation is independent of obligation in MCLA §600.3204(3) to have record chain of title.
 - Found foreclosure void, not voidable.
 - Probably limited to facts as litigated.

The Notice of Foreclosure

- MCLA §600.3212 requires:
 - Name of Mortgagor
 - Name of original mortgagee and/or foreclosing entity
 - Date of Mortgage
 - Date of recording
 - Amount claimed due on date of notice
 - Legal Description
 - Length of redemption period

The Notice of Foreclosure

- Although not required, typically also contains:
 - Interest rate
 - Time and place of sale
- Errors:
 - *Guardian Depositors v Keller*, 286 Mich 403 (1938) (slight/inconsequential mistakes insufficient to void foreclosure sale).

The Notice of Foreclosure

- Defective notice makes sale voidable, not void.
 - *Fox v Jacobs*, 289 Mich 619 (1939); *Jackson Investment Corp. v Pittsfield Products, Inc.*, 162 Mich App 750 (1987) (illogical to void sale if no harm suffered).
- No bright line test. Substantial compliance.
 - Look at effect on persons interested

The Notice of Foreclosure

- Defects making sale voidable:
 - Failure to name wife of mortgagor. *Oades v. Standard Sav. & Loan Ass'n*, 257 Mich. 469 (Mich. 1932)
 - Major Misspelling of Mortgagor's name. *Lee v. Clary*, 38 Mich 228 (1878); *Zlotoeczski v. Smith*, 117 Mich 202 (1898).
 - Inaccurate Description of Property. *Vary v. Chatterton*, 50 Mich. 541 (1883).

The Notice of Foreclosure

- Defects that substantially comply:
 - Minor misspelling of Mortgagee's name. *Reading v Waterman*, 46 Mich 107 (1881).
 - Minor error in description. *Snyder v Hemmingway*, 47 Mich 549 (1882).
 - Date of amended mortgage. *Calvert Associates v Harris*, 469 F.Supp. 922 (E.D.Mich. 1979).

The Notice of Foreclosure

- Defects that substantially comply:
 - Lack of book and page number of recording. *McCammom v The Detroit, Lansing & Northern Railroad Co.*, 103 Mich 104 (1894).
 - At which door of courthouse sale is held. *Bass v Federal Land Bank of St. Paul, Minnesota*, 300 Mich 418 (1942).
 - Amount claimed due, if in good faith. *Flax v Mutual Building & Loan Ass'n of Bay County*, 198 Mich 676 (1917).

The Notice of Foreclosure

- Defects that substantially comply:
 - Gender of Mortgagor. *Worthy v World Wide Financial Services, et al*, E.D. S.D. MI. Civil No. 04-72969 (unpublished).

Publication and Posting

- MCLA §600.3208

- Notice shall be given by publishing for 4 successive weeks at least once in each week.
 - Newspaper published in county where property situated; if none, adjacent county.
 - Publication must be for at least 28 days (i.e., 4 FULL weeks).
Jackson Investment Corporation v. Pittsfield Products, Inc., 162 Mich App 750 (1987); *Casey v Goetzen*, 240 Mich 41 (1927),
- Copy of notice posted in conspicuous place within 15 days of first publication.

Publication and Posting

- No requirement that junior lienholders get notice.
 - MCLA §559.208 requires notice be given to condo association within 10 days after first publication.
- If affidavit of posting executed, mortgagor has burden of proving property not posted. MCLA §600.3264; *Walsh v Colby*, 153 Mich 602 (1908).

The Sale

- MCLA §600.3216
 - Between 9:00 a.m. and 4:00 p.m.
 - Circuit Court
 - Must be conducted so that person of ordinary intelligence understands what property is being sold.
Hogan v Hester Investment Co., 257 Mich 627 (1932).

Adjournments

- MCLA §600.3220.
 - May be adjourned on weekly basis by posting.
 - More than weekly at one time requires publishing.
 - Often misunderstood.

Redemption

- MCLA §600.3240
 - Essentially, 6 months unless greater than 3 acres.
 - If so, than 1 year.
 - Rationale for extended redemption period.

Redemption

- MCLA 600.3240(2).
 - ROD will not calculate amount (Except Oakland and Macomb Counties. HB 5267)
 - Purchaser must include affidavit with deed
 - Precise amount needed to redeem.
 - Plus taxes, condo/homeowner association taxes, amount to redeem senior liens, insurance premiums.
 - Date redemption expires
 - May include designee to aid in redemption
 - Stuck with calculation
 - May charge fee

Redemption

- Shortening Redemption if abandoned:
 - Post-publication. MCLA §600.3241a.
 - Post and mail notice.
 - Not rebutted within 15 days.
 - 30 days/within time to rebut, whichever is later. MCLA §600.3240(11).
 - Recent change: PA 579 of 2006
 - Can shorten at any time in process until redemption ends.
 - Can shorten if more than 3 acres
 - Trigger event is sending of notice.
 - Recent Case: *Hartstock v. FHLMC and Orlans, Associates*
 - Lesson is the same—need good lawyering!

Evictions

- **Current trends/issues:**
 - Local ordinances requiring owner to place large movable container on private area of owner's property for disposal of personal property.
 - Must be removed within 48 hours
 - Large fine if violated.
 - Cumbersome, but may be valid public policy.

Judicial Foreclosures

- Jurisdiction in Circuit Court. MCLA §600.3101.
- Venue where property is located. MCLA §600.1605.
- Must include anyone with interest in the property.
 - Must obtain service on all parties.

Judicial Foreclosures

- Sale may not take place within 6 months of the filing of the Complaint. MCLA §600.3115.
- Publish for 6 weeks prior to sale. MCLA §600.6052(2).
- Post in 3 public places in township or city. MCLA §600.6052(1).

Judicial Foreclosures

- Court may fix upset price. MCLA §600.3165.
- May not shorten redemption period if abandoned.

Mortgagor in the Military

- **Servicemembers' Civil Relief Act**

- Intended to protect mortgagors who enter **active military service** after entering into mortgage.
- Absent obtaining a court order or agreement, may not foreclose during active service or within 90 days.
 - Extended to 9 months (until 12/31/10).
 - Recent Michigan statute changed to 6 months for Michigan, only. PA 138 (May, 2008).
 - Applies to situations where service member entered into mortgage before active duty or where service member is on overseas duty.
- Also affects interest rate that may be charged.
- Can check at:

<https://www.dmdc.osd.mil/scra/owa/home>

Contact Information

TROTT & TROTT, P.C.
31440 NORTHWESTERN HWY
FARMINGTON HILLS, MI 48334

(248) 642-2515
(888) 22- TROTT

Jeff Weisserman
(248) 723-5906

jweisserman@trottlaw.com

